United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

887

BRIEF FOR APPELLANT

United States Court of Appeals

For The

District of Columbia Circuit

No. 22585

United States of America,
Appellee

v.

Willie D. Heard,
Appellant

Appeal From Judgment of Conviction in the United States

District Court for the District of Columbia

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(Appointed by this Court)

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Appeal From Judgment of Conviction in the United States

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BRIEF FOR APPELLANT

STATEMENT OF QUESTIONS PRESENTED

In a two count indictment . . . alleging violation of 22 D.C. Code § 2801, carnal knowledge of a female under sixteen years of age, and violation of 22 D.C. Code § 3501(a), the taking of indecent liberties with a female under sixteen years of age, it was error for the trial judge to permit the jury to find the defendant guilty on both counts without an instruction that the jury could consider the violation of § 3501 (a) only if the jury found

the defendant not guilty of the violation of § 2801.

A subsidiary question is whether, in view of the above error, the concurrent sentence doctrine is applicable in this case.

This case has not previously been before this Court.

JURISDICTIONAL STATEMENT

On May 20,1968, Willie D. Heard, Appellant, hereinafter referred to as the defendant, was indicted in the United States District Court for the District of Columbia on two counts: (1)violation of 22 D.C. Code §2801, carnal knowledge of a female under sixteen years of age, and (2) violation of 22 D.C. Code §3501(a), indecent liberties with a female under sixteen years of age. Both counts stem from the same incident alleged to have occurred on March 18,1968, at the home in northeast Washington of the victim,a girl of fourteen years of age. The defendant was arraigned on June 7,1968, and pleaded not guilty. Trial before a jury commenced on September 6,1968,and on September 11,1968, the jury returned a verdict of guilty on both counts. Defendant was sentenced on November 1,1968, to a term of two years to eight years on each count, the sentences to run concurrently. On November 4,1968, defendant filed his notice of appeal to this Court. On November 4,1968,the trial judge,by order, permitted this appeal without prepayment of costs, and also ordered the preparation of the transcript of the trial proceedings at government expense.

The defendant himself has filed several pro se pleadings, such as motion for new trial, petition for writ of habeas corpus, motion to vacate sentence, all of which were denied by the trial judge. None of these pro se pleadings raised the issue here presented. Generally such pleadings attacked the credibility of the witnesses for the prosecution.

STATEMENT OF THE CASE

As indicated above, defendant was convicted of violation 22 D.C. Code § 2801 and §3501(a). The female child involved, who testified as a prosecution witness, stated that she was fourteen years of age; that she lived with her mother in northeast Washington; that she was familiar with defendant who had been dating her mother; that at about 5:00 P.M. on March 18, 1968; while her mother was at work, defendant came to the house, she admitted him, and that he attacked her sexually. Defendant took the witness stand and denied the accusation, relying on an alibi. For purposes of the principal question raised on this appeal, no further details of the evidence need be cited.

STATUTES INVOLVED

The pertinent provision of 22 D.C. Code §2801 reads as follows:

> "Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years".

The pertinent provisions of 22 D.C. Code §3501 read as follows!

> (a) "Any person who shall take, or attempt to take any immoral, improper, or indecent liberties with any child of either sex, under the age of sixteen years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of such person or of such child, or both such person and such child, or who shall commit, or attempt to commit, any lewd or lascivious act upon or with the body, or any part or member thereof, of such child, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child shall be imprisoned in a penitentiary, not more than ten years."
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> **********
>
> (d) "The provisions of this section shall not apply to the offenses covered by Section 22-2801. June 9,1948, ch.428, Title I, §103, 62 Stat.347."

ARGUMENT

It is not open to question that this Court has interpreted the provision - "The provisions of this section shall not apply to the offenses covered by Section 22-2801" - Section 3501 (The Miller Act) as proscribing a guilty verdict under both sections. Dozier v. United States, 127 App.D.C. 266, 382 F2d 482 (1967); Whittaker v. United States, 108 App.D.C. 268,281 F2d 631 (1960);Younger v. United States, 105 App.D.C. 51, 263 F2d 735 (1959); Thompson v. United States, 97 App.D.C. 116, 228 F2d 463 (1955). In Thompson, supra, the question arose whether violation of both Sections 2801 and 3501 could be joined in the same indictment. In holding that the counts could be joined in the indictment, this Court observed, however,

that the jury must be instructed "that it could not find the defendant guilty of both counts and could find him guilty of the Miller Act violation only if he was found not guilty of carnal knowledge". 97 App. D.C. at 117, 228 F2d at 464. To the same effect are Younger, Whittaker and Dozier, supra. In Dozier, the trial judge refused to give an instruction requested by the defendant that the defendant could be found guilty of the Miller Act violation only if the jury found the defendant not guilty of the charge of assault with intent to commit carnal knowledge.[1/] In disapproving this action of the trial judge, this Court stated: "The course thus adopted by the court was contrary to three opinions of this court" citing the Whittaker, Younger, and Thompson cases, 127 App.D.C. at 267, 382 F2d 482,483.

While the precise question was not presented to the trial court in the case at bar, it is submitted that such a plain error should be noticed by this Court within the intendment of Rule 52(b) of the Fed.Rules of Cr. Proc.

Since defendant in the case at hand was given concurrent sentences under both counts, and the sentence under §3501 was within the permissible limits of that section,[2/] it may be argued that under the concurrent sentence doctrine defendant is not prejudiced by the failure of the trial judge to instruct the jury properly. In Dozier, supra, this Court after noting the error of the trial judge set aside the conviction on the carnal knowledge count, but affirmed the judgment of conviction. But in Dozier the defendant there was indicted, found

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1/ The principle here advanced is not affected by the fact that the other count involved the lesser included offense of assault with intent to commit carnal knowledge under 22 D.C. Code § 501, rather than having carnal knowledge under Section 2801. Thompson involved a count under Section 2801.

2/ Hirabayashi v. United States, 320 U.S. 81 (1943).

guilty and sentenced under the additional count of housebreaking, and the sentences were to run concurrently on all three counts. Since there was no question of the defendant's guilt and sentence under the housebreaking count, no serious prejudicial error resulted to the defendant there in this Court's affirmance of the Section 3501 violation.

But here, only the violation under the two counts went to the jury. We have to surmise what the jury might have done if it had been given the proper instructions. And the same speculation covers the trial judge's sentencing under both counts. The trial judge sentenced defendant to a term of two to eight years on the more serious violation of Section 2801. While this sentence is within the limits of Section 3501, we must speculate that had the jury been properly instructed and returned a verdict of not guilty on the Section 2801 charge and a guilty verdict under Section 3501, then we must make the further speculation that the trial judge would have imposed the same sentence as he had assumed would be applicable to the more serious Section 2801 section. At the very least, the defendant is entitled to be re-sentenced as if he were guilty of only one count, else the proscription in Section 3501 - the provisions of this section shall not apply to the offenses covered by Section 22-2801 - becomes a useless and meaingless provision.

In Washington v. United States, 98 App. D.C. 100,232 F2d 357,(1956), the defendant was indicted and sentenced under a two count indictment, one

of which this Court found unconstitutional. Though the concurrent sentence on the remaining valid count was within the limits of that violation, this Court nonetheless remanded the case to the District Court for re-sentencing under the valid count. See the cases cited therein opposing the concurrent sentence doctrine.

Moreover, the Supreme Court is becoming aware of the injustice of the doctrine in certain cases. On December 16,1968, in Benton v. Maryland, 37 L. 3219, 89 S.Ct. 481, the Supreme Court granted re-argument limited to the single question whether the " 'concurrent sentence doctrines' enunciated in Hirabayashi v. United States, 320 U.S.81, 105 and subsequent cases have continuing validity in light of such decision as Ginsberg v. New York" and other cases there cited.

CONCLUSION

For all of the foregoing, the judgment should be reversed and the case remanded for a new trial. At the very least, the conviction on the first count should be set aside, and the case remanded for re-sentencing on the second count.

Respectfully submitted,

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(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 22,585, 22,586

UNITED STATES OF AMERICA, APPELLEE

v.

WILLIE D. HEARD, APPELLANT

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
LAWRENCE LIPPE,
DAVID C. WOLL,
Assistant United States Attorneys.

Cr. No. 596-68

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* Cases chiefly relied upon are marked by an asterisk.

ISSUE PRESENTED

In the opinion of appellee, the following issue is presented:

Whether the trial court's failure to instruct the jury that it could not find appellant guilty on the count of taking indecent liberties with a minor child unless it found him not guilty of the charge of carnal knowledge requires reversal or remand for resentencing, or can be cured by vacating the conviction as to the lesser included offense of taking indecent liberties.

This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 22,585, 22,586

UNITED STATES OF AMERICA, APPELLEE

v.

WILLIE D. HEARD, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a two count indictment filed May 20, 1968, appellant was charged with carnal knowledge under 22 D.C. Code § 2801 (1967) and taking indecent liberties with a minor child under 22 D.C. Code § 3501(a) (1967). In a jury trial that commenced on September 6, 1968, and terminated on September 11, 1968, before The Honorable John Lewis Smith, Jr., Judge of the United States District Court for the District of Columbia, appellant was found guilty on both counts. On November 1, 1968, ap-

pellant was sentenced to 2 to 8 years imprisonment on each count, said sentences to run concurrently.

The Government's evidence centered around the testimony of the 14 year old complainant in both counts, Miss Victoria Holley of 5033 Sargent Road, N.E. Miss Holley testified that on March 18, 1968, at approximately 5:00 p.m., she was alone in her house, her mother still being at work, when appellant appeared at her door. (Tr. 61, 75) Appellant was known by Miss Holley since he had been keeping company with her mother for several months prior to the alleged crime and had visited the house frequently. (Tr. 59, 60, 78). Appellant and Miss Holley conversed for a short while in the living room. (Tr. 64). Appellant then pushed her against a door, began to kiss her and caress her (Tr. 65), and eventually led her down to the basement of the house where he forced her on a couch and had sexual relations with her. (Tr. 68-70). Just before coitus, appellant removed himself from Miss Holley with the result that semen fell on the floor and couch. (Tr. 70). Before he left the house, appellant warned Miss Holley, "don't tell anybody else because this is our secret." (Tr. 71). After appellant left, Miss Holley, describing her condition at that time as "nervous", called her boyfriend, Robert Andrews, and related to him partially what had transpired. (Tr. 72-74). When her mother came home from work between 6:30 and 7:00 p.m., she did not tell her what had happened, but finally hesitantly disclosed the occurrence around 11:00 p.m., just after her mother received a telephone call from appellant. The reason given for the delay in relating what transpired was that she was afraid. (Tr. 75, 92, 93).

Mrs. Doris Holley, Victoria Holley's mother, testified concerning her social involvement with appellant and that they broke up about a month before the alleged crime. (Tr. 101). She stated that subsequent to that time, she had no further contact with appellant until the night of the attack when he called her on the telephone. (Tr. 111). When her daughter related to her that eve-

ning what had happened, Mrs. Holley was indecisive as to what to do, but on the next morning decided to call the police (Tr. 109).

Other Government evidence included the testimony of an F.B.I. chemist concerning the presence of a seminal stain on a piece of plastic taken from the couch in the Holley basement (Tr. 157-159, 168-169), and a medical report of an examination of complainant, made on the day after her attack, to the effect that the hymenal membrane of Miss Holley was not intact. (Tr. 175).

Appellant took the stand during the trial and admitted that he had visited the Holley home around 4:30 p.m. on March 18 in order to borrow $100.00 from Mrs. Holley, but since she was not at home, he never entered the home and only conversed with the complainant for a moment at the door. (Tr. 238-239). He denied being at the Holley home at the time the alleged attack occurred. (Tr. 240-241.)

ARGUMENT

The trial court's failure to charge the jury in the alternative as to the two counts of carnal knowledge and taking indecent liberties with a minor child does not necessitate reversal or re-sentencing, but can be cured by vacating the conviction as to the lesser included offense of taking indecent liberties.

Appellant correctly contends, although raised for the first time on appeal,[1] that the trial judge should have

[1] Appellant's failure to bring to the Court's attention the specific instruction he now contends he was entitled to have raises the question whether this Court may wish to view the trial court's error, obviously an oversight on its part, as "plain error" under Rule 52(b), Fed. R. Crim. P. See also Rule 30, Fed. R. Crim. P. The trial court asked appellant's counsel whether he wished the court to instruct the jury as to the lesser included offense of assault with intent to commit carnal knowledge (22 D.C. Code § 501). Counsel objected to such an instruction, or an instruction as to "any other lesser included offense", stating as his reason that it was "the theory of the defense that he (appellant) didn't do it. . . . As far as I can see at this trial, either he did it or he didn't (attack Miss Holley)." (Tr. 215, 218-219).

charged the jury that they could not find appellant guilty of both counts of the indictment, but could only find him guilty under the second count (taking indecent liberties with a minor child) if they found him not guilty on the first count charge of carnal knowledge.[2] It is well established that although the Miller Act violation of taking indecent liberties, under 22 D.C. Code § 3501(a), is a lesser included offense under the carnal knowledge statute (22 D.C. Code § 2801),[3] and both offenses may be joined together in one indictment, the two offenses are inconsistent in law with each other.[4]

In view of the trial court's error, appellant urges reversal for new trial or at least for vacation of the conviction for carnal knowledge and re-sentencing on the Miller Act charge. It is evident, however, that the ap-

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[2] *Dozier* v. *United States*, 127 U.S. App. D.C. 266, 382 F.2d 482 (1967); *Whittaker* v. *United States*, 108 U.S. App. D.C. 268, 281 F.2d 631 (1960); *Younger* v. *United States*, 105 U.S. App. D.C. 51, 263 F.2d 735, *cert. denied*, 360 U.S. 905 (1959); *Thompson* v. *United States*, 97 U.S. App. D.C. 116, 228 F.2d 463 (1955).

[3] 22 D.C. Code § 2801 provides in pertinent part:

> Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years . . .

22 D.C. Code § 3501 provides in pertinent part:

> (a) Any person who shall take, or attempt to take any immoral, improper, or indecent liberties with any child of either sex, under the age of sixteen years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child, or who shall commit, or attempt to commit, any lewd or lascivious act upon or with the body, or any part or member thereof, of such child, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desire, either of such person or of such child, or of both such person and such child shall be imprisoned in a penitentiary, not more than ten years.
>
> (d) The provisions of this section shall not apply to the offenses covered by section 22-2801.

[4] *Thompson* v. *United States, supra; William H. Fuller* v. *United States*, No. 19,532, D.C. Cir. (*en banc*), September 26, 1968, pp. 5-6 of slip op.

pellant's circumstances are similar to those presented in *Dozier* v. *United States*, *supra*. There, although appellant did request the trial court to render the alternative count charge to the jury and the trial court refused, the appellate court ruled that remand was unnecessary and proceeded to affirm the conviction for taking indecent liberties and set aside the conviction for carnal knowledge. The Court noted that it was "clear from the fact that the jury convicted on both the second (assault with intent to commit carnal knowledge) and third (taking indecent liberties) counts that the failure of the court properly to instruct as indicated did not impair the verdict on the third count, the less serious of the two offenses." At pp. 267, 483.

Based on the holding in *Dozier*, we submit that appellant's conviction on the taking indecent liberties charge was not impaired, so that reversal or remand is clearly not in order. Furthermore, appellant's sentence of two to eight years on the Miller Act charge was proper and within the limits proscribed for the offense.

We would further submit, however, that the Court's reasoning in *Dozier* for setting aside the conviction for assault with intent to commit carnal knowledge cannot be reconciled with the recent decision of this Court, sitting *en banc*, in *Fuller* v. *United States*, *supra*. The *Dozier* Court concluded that "it cannot be said that had the jury been told they could not convict on (the Miller Act violation) unless they found defendant not guilty on the (assault with intent to commit carnal knowledge count) they would have returned a guilty verdict on the latter count." [5] The Court went on to observe:

> The jury might have decided to convict only for the less serious offense charged in the third count had they been permitted to choose between the two counts rather than to consider each independently of the other. Although the jury, under erroneous instructions, decided that *all the elements of the sec-*

[5] At pp. 267, 483.

ond count were proved, it does not follow that under proper instructions they would have done so rather than resting their verdict upon the third count.[6] (Emphasis added)

In *Fuller* v. *United States*, *supra*, appellant, charged with first degree murder under the felony-murder rule (Count I), first degree premeditated murder (Count II), and rape (Count III), was convicted of first degree felony-murder, manslaughter, as a lesser included offense of first degree premeditated murder, and rape. The charges submitted to the jury by the trial court were first-degree felony-murder, second degree murder, having been reduced by the trial court from first degree premeditated murder, and rape. Appellant's counsel contended that "the judge erred in instructing the jury to render a verdict on each count and in *failing to instruct them that these (first-degree felony-murder and second degree murder) were alternative counts, and that a verdict of guilty on Count I* [redacted] *prohibited a verdict of guilty on Count II and vice versa*". At p. 2 of slip op. (Emphasis added).

The Court ruled, however, in affirming the convictions, that while second degree murder was a lesser included offense of first degree felony-murder, there was no reason why the jury had to elect between the two, unless the defendant affirmatively requested that the jury be charged in the alternative count form. At p. 8 of slip op. Of course, if such a request were made, the Court pointed out, the jury would have to be told "to consider first the greater offense and to move on to consideration of the lesser offense *only if they have some reasonable doubt as to guilt of the greater offense.*" At p. 13 (emphasis added).

The Court in *Fuller* made clear, however, that only in those cases where the offenses joined together were not in conflict with each other, would the jury be allowed to enter verdicts as to both offenses. At p. 9. While in the present case, the verdicts were in conflict with each

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[6] *Ibid.*, at pp. 267-268, 483-484.

other, it is significant to note that in *Fuller* appellant argued that an instruction in the alternative count form was nonetheless required to avoid what the Court termed, "jury room mystique: namely, that when all is said and done, one can never tell what would have gone on in the jury room had the (alternative) charge been given". At p. 21. The Court flatly rejected such an argument by pointing out that had the jury considered the two counts in the alternative, it would have had to first consider the highest crime charged and considered whether the defendant was guilty on that charge. Only if the jury had a reasonable doubt as to guilt of the higher offense could the jury then "turn to consideration of whether defendant is guilty of the lesser offense." At p. 21.

By the same token, had the trial judges in both *Dozier* and the present case presented both counts to the jury in the alternative form, as indeed they were required to do, the jury would have been restricted solely to consideration of the greater charge, weighing the evidence as to each element, and deciding upon a verdict *before* they could turn their attention to the lesser charge. Thus, the Court's assertion in *Dozier* that had the jury been informed of the alternative nature of the verdicts they were to return, they would have been free to function in an unrestricted fashion "to choose between the two counts." [7] has been clearly repudiated by the *en banc* Court in *Fuller*.

Quite to the contrary of *Dozier*, the holding of *Fuller* means that submission of the greater and lesser offenses to the jury as independent counts gives the jury greater latitude to weigh one count against the other for purposes of making a choice.[8] Despite such latitude, the

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[7] *Dozier* v. *United States, supra* at pp. 267, 483.

[8] *Fuller* v. *United States, supra* at p. 21 where the Court states:

> We might reach a different result if we started from the premise that the jury has an *unrestricted function* in determining whether its verdict should reflect a conclusion of guilt as to the lessor or greater offense.

jury in the present case, as was acknowledged by the Court in *Dozier* "decided that all the elements" of the carnal knowledge count were present.[9] For that reason, the conviction for carnal knowledge should be allowed to stand.

Under the disposition we urge the conviction as to taking indecent liberties should be set aside. Inasmuch as the punishment imposed for carnal knowledge was not in excess of the permissible sentence authorized for the lesser included offense, the Miller Act conviction became merged in the carnal knowledge conviction,[10] "so that no particular reason why that concurrent sentence should be left standing" exists.[11]

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[9] At pp. 268, 484.

[10] *United States* v. *Leather*, 271 F.2d 80, 86 (7th Cir. 1959) and cases cited therein.

[11] *Fuller* v. *United States*, *supra*, n. 52 at pp. 22-23. See also *Allison* v. *United States*, No. 21,862, D.C. Cir., February 17, 1969, at p. 11 of slip op.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court as to the conviction for carnal knowledge should be affirmed and the judgment of the District Court as to the conviction for taking indecent liberties should be set aside.[12]

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
LAWRENCE LIPPE,
DAVID C. WOLL,
Assistant United States Attorneys.

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[12] In No. 22,586 appellant appeals the denial by the District Court of his *pro se* motion for a new trial. The reasons set forth in appellant's motion, which are not pursued by counsel on his brief, are clearly insufficient to require a new trial. See Rule 33, Fed. R. Crim. P. Appellant's contentions are conclusions wholly unsupported by any factual allegations that indicate prejudice. He fails to specify just what witnesses counsel failed to obtain and to proffer what their testimony would have been. He also fails to explain how testimony of the examining doctor, in lieu of the reading into evidence by stipulation of both parties of that doctor's medical report, would have substantially affected the outcome of the trial (Tr. 172-174). Certainly, such general assertions, without more detailed information, are insufficient to allow collateral relief. *Jones* v. *United States*, 103 U.S. App. D.C. 326, 258 F.2d 420, *cert. denied*, 357 U.S. 932 (1958); *Wilkins* v. *United States*, 103 U.S. App. D.C. 322, 258 F.2d 416 (1958); *Martin* v. *United States*, 101 U.S. App. D.C. 329, 248 F.2d 651 (1957).

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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE
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Nos. 22585, 22586

UNITED STATES OF AMERICA,

APPELLEE

v.

WILLIE D. HEARD,

APPELLANT

APPEAL FROM JUDGMENT OF CONVICTION IN THE
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FOR THE DISTRICT OF COLUMBIA

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(Appointed By This Court)

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WILLIE D. HEARD, Appellant

APPEAL FROM JUDGMENT OF CONVICTION IN THE

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FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

In this two-count indictment charging (1) carnal knowledge of a minor female, and (2) the taking of indecent liberties, the Government concedes that it was error for the trial judge to fail to charge the jury that it could not find the defendant (Appellant here) guilty of both counts.[1/] The Government contends, however, that reversal or resentencing is not required (though agreeing that the conviction on count two should be vacated) because of Dozier v. United States, 127 App. D.C. 266, 382 F2d 482 (1967), and Fuller v. United States, No. 19532, D.C. Cir., September 26, 1968. _____App. D.C. _____, _____F2d _____.

1/ Though raised here for the first time, the Government does not seriously dispute that this is just the kind of plain error within the purview of Rule 52(b), Fed. Rules of Cr. Proc. which should be noticed by this Court.

It is submitted that Dozier does not support the Government's position, but rather it supports the position of Appellant that there should be a new trial, or, at the very least, the conviction on the first count should be set aside, and the case remanded for resentencing on the second count. Fuller is entirely inapposite.

Taking Fuller first, all that the Court decided there was that Naples[2] did not require the trial judge in an indictment charging felony murder in the first degree and first degree premeditated murder (reduced by the trial judge to second degree murder) to charge in the alternative, so that it was permissible for the jury to return a verdict on each count. The exact opposite is the situation here, for by 22 D.C. Code Section 3501(d), the trial judge is required to charge in the alternative, where there is a carnal knowledge count under 22 D.C. Code, Section 2801, and a Miller Act count under 22 D.C. Code, Section 3501 - and the jury may not bring in a verdict of guilty under both counts. Dozier, supra; Whittaker v. United States, 108 App. D.C. 268, 281 F2d 631 (1960); Younger v. United States, 105 App. D.C. 51, 263 F2d 735 (1959); Thompson v. United States, 97 App. D.C. 116, 228 F2d 463 (1955). As a matter of fact, at the very beginning of its discussion in Fuller (slip. op., pp. 4-5), the Court excluded the precise situation here as being inapposite. The Court put it this way (op. cit.):

2/ Naples v. United States, 120 App. D.C. 123, 344 F2d 508 (1964)

> Sound doctrine generally permits jury convictions of legally distinct offenses, but precludes a jury verdict finding a defendant guilty of two offenses that are inconsistent with each other as a matter of law (citing Dozier and Thompson, supra, inter alia). Where such inconsistency is present the jury should be charged in the alternative - to convict of one offense or the other, but not both.[3/] Such a charge heightens the jury's understanding of the separate legal requisites for each offense. To determine whether the relation between particular offenses mandates application of an alternative charge requires investigation of the common law and statutory background of the crimes.
>
> . . . . .
>
> Another example of inconsistency is carnal knowledge, made criminal by 25 (sic) D.C. Code, Section 2801, and taking indecent liberties with a child, made criminal by the Miller Act. Here the inconsistency results from the Miller Act's express exclusion of crimes of carnal knowledge from the area that the Miller Act - with its liberalized parole and release procedures - was designed to cover. Here too, the jury must be told that they may not find the defendant guilty of both offenses. If he is guilty of carnal knowledge, he is not within the Miller Act. (Emphasis added; footnotes omitted.)

While the Court in Fuller supported its decision by considering second degree murder as a lesser included offense of first degree felony-murder, it does not follow, even if arguendo the Miller Act violation is considered a lesser included offense of carnal knowledge, that the statutory prohibition of 22 D.C. Code, Section 3501(a) is thereby negated. The language of the Court in Fuller should be taken in context of the fundamental

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3/ We shall show that at the very least, Dozier requires the vacation of the carnal knowledge count, and resentencing on the indecent liberties count.

position of the Court that it was deciding a multiple murder indictment, after expressly excluding the precise situation here. The point in Fuller is that the Court found no prejudicial error in permitting the case to go to the jury without a charge on alternatives either on the basis of Naples II or lesser included offense. Here the alternative charge is required. As the Court concluded in Fuller (slip op., p. 21);

> Multiple convictions cannot be said to constitute grounds for reversal unless either the crimes are truly inconsistent[4]/ or the circumstances are such as to make it reasonable to conclude that the jury was unable to keep the various matters separate or may have been confused as to what constituted the particular offenses. (Emphasis added).

Turning to Dozier, supra, we fail to see how that case supports the Government's position. In that case the defendant was convicted of three counts: (1) house-breaking with intent to commit carnal knowledge, (2) assault with intent to commit carnal knowledge, and (3) taking indecent liberties with a minor. The trial judge, though requested, refused to instruct the jury that the defendant could be found guilty of the Miller Act violation only if the jury found the defendant not guilty of assault with intent to commit carnal knowledge. The jury returned with a verdict of guilt on all three counts, and the defendant was given concurrent sentences on all three counts. In disapproving the action of the trial court, this Court set aside the conviction on the carnal knowledge count, but affirmed the conviction on the

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[4]/ It can hardly be denied that the two crimes involved here are inconsistent by operation of the statute.

Miller Act violation. But in Dozier, the defendant was already concurrently sentenced on the housebreaking count.

The point in Dozier is that having let the case go to the jury without the benefit of the alternative charge, and even though the jury found the defendant guilty of both counts (as well as the housebreaking count), this Court vacated the verdict under the carnal knowledge count and permitted the verdict and concurrent sentence of the Miller Act count to stand. In the case at hand, it is submitted that since only two counts were involved, defendant is entitled to a new trial, or at the very least, the verdict on carnal knowledge should be vacated, and the defendant resentenced on the Miller Act count.

While the Government leans on Dozier as supporting its position, it infers that Fuller, supra, has overruled Dozier. It is submitted that such a reading of Fuller is clearly unwarranted. The precise issue at bar was not involved in Fuller, and the only clear reference to Dozier, Whittaker, Younger and Thompson was to the effect that such sex counts were clearly excluded from consideration by operation of 22 D.C. Code, Section 3501(d). The recent case of Allison v. United States, No. 21862, D.C. Cir., Feb. 17, 1969, _____App. D.C._____, _____F2d_____, recognizes that Fuller has no applicability to the situation here. As a matter of fact, in that case, this Court finding lack of corroboration on the assault with intent to commit carnal knowledge count remanded with directions to enter a judgment of guilty of the Miller Act count, unless the trial judge determined to grant a new trial in the interest of justice. The significant point

in Allison is that the jury did find the defendant guilty of the assault to commit carnal knowledge after receiving the proper instruction on the alternative counts.

As the Court recognized in Fuller (slip op., p. 5), where the offenses are inconsistent, the jury must be charged in the alternative. Such inconsistency can arise by virtue of the statute as here, or by virtue of fact or logic, such as larceny and receiving stolen goods. In Milanovich v. United States, 365 U.S. 551 (1961), the defendant (wife) was convicted of (1) stealing, and (2) receiving and concealing the stolen property (money), and was sentenced to ten years on (1), and five years concurrently on (2). The Court of Appeals set aside the concurrent sentence for receiving, on the ground that the verdicts on the two counts were inconsistent, but the Court of Appeals did no more. On review, the Supreme Court reversed and granted a new trial on the ground that the trial judge should have given an instruction alternatively, stating:

> . . . there is no way of knowing whether a properly instructed jury would have found the wife guilty of larceny or of receiving (or conceivably of neither). Thus we cannot say that the mere setting aside of the shorter concurrent sentence sufficed to cure any prejudice resulting from the trial judge's failure to instruct the jury properly. (365 U.S. at 555).

Similarly, in the case at bar, the defendant is entitled to a new trial, for by statute he was entitled to the alternative charge.

As indicated in Appellant's main brief, the defendant has filed several pro se pleadings. Among these was a motion for

release on personal recognizance, which was denied by the trial judge and an appeal taken from said denial. Present counsel assumed that No. 22586 covered said appeal. Since present counsel has presented to this Court a separate application for defendant's release, nothing further was done in No. 22586. It now turns out that the appeal in No. 22586 covers both the appeal from the denial of the motion for release and the denial of a pro se motion for new trial. The motion for new trial alleges that defendant received ineffective assistance of trial counsel in that said trial counsel failed to move to dismiss the indictment based upon the evidence produced at the preliminary hearing and was insufficient to sustain a finding of probably cause. At the hearing before a judge of the Court of General Sessions on the question of probably cause, defendant was represented by an attorney, but not the same one who tried the case on the merits; said attorney did move that there was insufficient evidence of probable cause, and the judge overruled said motion. The prosecuting witness and her mother testified at said preliminary hearing. In these circumstances, it is difficult to see how trial counsel can be faulted for the ruling on probable cause.

Another ground for new trial is based on the fact that trial counsel stipulated that the Government could read a portion of the report of the doctor who examined the prosecuting witness two days after the alleged rape, since the doctor was unavailable. The portion of the doctor's report stipulated to be read to the jury was to the effect that the doctor was able to introduce a speculum into the vaginal area, and in view of this fact, he

would state that that indicates that the hymenal membrane of the prosecuting witness was not intact, and that he had no way of being able to determine when the intactness was disrupted, but that it was indeed disrupted (Tr. 174-175). While obviously absent the stipulation such testimony would be hearsay and inadmissible, present counsel has discussed this with trial counsel and has been informed that since the question of the victim's hymenal membrane is a question of fact discernible by any qualified physician, trial counsel, as part of his trial strategy made the stipulation particularly to include the portion that the examining doctor had no way of being able to determine when the intactness was disrupted.

Finally, defendant alleges that trial counsel failed to call certain witnesses which the defendant requested. This matter was taken up with the trial judge (Tr. Sept. 11, 1968, pp. 2-4). Trial counsel told the trial judge that he had contacted one of the witnesses who denied making the statement attributed to him by the defendant, and in the words of trial counsel: "I could not see any purpose in calling a witness for the purpose of denying a statement that Mr. Heard said he said." (Tr. supra p. 3.)

It is submitted that defendant's pro se pleadings, however inartfully drawn, should be examined to see if there is a kernel of prejudicial error. Certainly such pro se pleadings should not detract from the central issue here that defendant did not receive the proper instructions to the jury. Because of this

error, he is entitled to a new trial, or at the very least, the setting aside of the verdict on carnal knowledge and resentencing on the Miller Act violation.

Respectfully submitted,

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